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CONTRABAND AND
THE WAR

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A SOLICITOR OF THE SUPREME COURT

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CONTRABAND AND THE WAR

OWING to the complexity of modern commercial relations, the mere existence of a state of war on a large scale necessarily involves heavy losses to the subjects of neutral States through the consequent diminution of purchasing power in the belligerent countries and shrinkage of trade. But, in addition to this, neutral merchants are liable to suffer damage through the operation of those rules of international law which require them to refrain from certain forms of trade with a State at war—even though simply in continuation of their commerce in time of peace—which would interfere with the military operations of either of the belligerents or strengthen one of them for the prosecution of hostilities against the other. International law makes such trade unlawful, regardless of the injury thereby inflicted upon neutrals, because of the manifest necessity of a belligerent under the principle of self-preservation. At the inception of the modern law of nations over three hundred years ago, this was clearly recognized by the great jurist, Albericus Gentilis, who shows that private interests can only be respected during war so long as their enjoyment does not conflict with the safety of States. ‘*Ius commerciorum aequum est,*’ he says, ‘*at hoc aequius tuendae salutis. Est illud gentium ius : hoc naturae est. Est illud privatorum : est hoc regnorum. Cedat igitur regno mercatura, homo naturae, pecunia vitae.*’¹

¹ *De Iure Belli*, Bk. I, ch. xxi (Holland’s edition (1877), p. 97).

The fact that the neutral persons affected are to a large extent really innocent sufferers cannot be allowed to impair the efficacy of a belligerent's arms. This is particularly the case in the great war now raging, in which the gradual wearing down of Germany by the exercise of sea-power is indispensable for the self-preservation of Great Britain and her Allies. They are engaged in a life-and-death struggle for everything they hold dear, and are therefore naturally entitled, while respecting and safeguarding neutral interests as much as possible, to use to the uttermost all legitimate means for the coercion of the enemy.

At the present day the chief restrictions imposed by international law upon neutral commerce result from the operation of the rules relating to contraband of war. 'Contraband of war' is the designation of goods of warlike use, whether owned by an enemy or a neutral, found by a belligerent on board a neutral vessel on the high seas or within his own or his enemy's territorial waters, on their way to assist in his enemy's naval or military operations. A neutral vessel is one which is entitled to fly the flag of a neutral power,¹ and such a vessel would herself be contraband if suitable for any warlike use and destined for sale in a hostile port or for delivery to the enemy. Neutral goods of the character and with the destination in question would also be contraband when found on board an enemy vessel; but enemy goods found on board a similar vessel would be liable to capture simply as being the property of the enemy, and their nature and destination would be immaterial. Formerly it was unnecessary to consider the nature or character of enemy property on board a neutral vessel, but now, under the Declaration of

¹ Declaration of London, Article 57.

Paris, 1856,¹ the neutral flag covers such property with the exception of contraband of war.

The term 'contraband of war' applies properly to goods only, and carriage of contraband must be carefully distinguished from the carriage of persons and dispatches for the enemy. The expressions 'quasi-contraband' and 'analogues of contraband' used frequently to be employed to denote traffic of the latter kind, and in the early stages of the law of nations it was not dealt with separately. But carriage of persons and dispatches takes place in the direct service of the enemy, and is therefore more properly called 'unneutral service' and treated as a distinct branch of the law of neutrality.

Neutral commerce may be further interrupted by the establishment of a blockade, under which a belligerent is allowed, subject to certain specific conditions, to interdict all communication by sea with the whole or part of the enemy's coast, and not merely to prevent him from receiving anything that would augment his naval or military resources.

At the Second Hague Conference in 1907 Great Britain made a proposal for the complete abolition of the doctrine of contraband; but this was opposed by France, Germany, Russia, and the United States of America, and was dropped. There has always been a great want of uniformity in international practice and opinion with regard to contraband of war; and the subject proved so contentious at the Hague that the Committee entrusted with its consideration could only report in favour of submitting the whole question to a fresh examination by the interested States. This it received at the Naval Conference of 1908-9, and, as

¹ Article 2. The Declaration of Paris will be found in the *Manual of Emergency Legislation*, p. 446.

the result of much discussion and compromise, an agreement was arrived at and embodied in the Declaration of London.¹ But although this Declaration has been signed by all the Powers represented at the Conference, it has not been ratified by Great Britain, who has merely adopted its provisions as her present rule of action, subject to such modifications and additions, consistent with the law as previously established, as are rendered necessary by the special circumstances of the war.

The Declaration is accompanied by a Report of the Drafting Committee, which the Order in Council of August 20, 1914,² by which the modified rules of the Declaration of London were first adopted, directed all British Prize Courts to consider as an authoritative statement of the meaning and intention of the Declaration. But this direction is dropped in the subsequent Order in Council of October 29,³ which repealed and replaced the earlier one; and although the Report was expressly adopted by the Conference as a guide to the meaning of the Declaration, it is doubtful whether it can really be regarded as authoritative. In English law a draftsman is not allowed in this way to define the intention of his own document.

ORIGIN AND THEORY OF CONTRABAND

The origin of the law of contraband is to be found in the proclamations or warnings which it became the usage for powerful belligerents, as early as the thirteenth century, to issue at the commencement of a war forbidding all ships to carry supplies of any kind to the enemy under penalty of confiscation. Before the end

¹ The Declaration of London will be found, with the Report, in the *Manual of Emergency Legislation*, pp. 447-514.

² *Manual of Emergency Legislation*, p. 143.

³ *Id. sup.* No. 2, p. 78.

of the sixteenth century there was a distinct tendency for a sovereign at war to be satisfied with prohibiting the carriage of such articles only as he deemed to be of assistance to his enemy in maintaining the war. Neutral States acquiesced in this restricted interference with the commerce of their subjects, with the result that in time a belligerent acquired a customary right to punish any attempt to transport articles of warlike use to his enemy as an unlawful act on the part of the neutral merchant. The right of a State at war to prevent this mode of succouring its enemy was confirmed by treaty provisions; and the notion of the unlawfulness of such commerce was clearly held by all the early theoretical writers and was also strengthened by the fact that from the earliest times the municipal laws of Greece and Rome had punished the furnishing of arms and other appliances of war to the enemy with death or exile and confiscation of property, while similar provisions were contained in the Canon Law regarding trade by Christians with the Saracens.

At the present day every neutral Power is bound to abstain from supplying, either in its corporate capacity or through the action of its officials or public servants, any kind of war material to the belligerents;¹ and if it failed in this duty it would commit a breach of national neutrality for which the State as a whole would be liable to make full reparation to the injured belligerent. But during the Middle Ages a State could maintain that it was no party to a war and yet furnish one or both of the belligerents with money, troops, and other kinds of assistance; and therefore, in the absence of an express convention, it was impossible to hold a neutral sovereign responsible for the acts of his subjects

¹ See Article 6 of Hague Convention, No. XIII of 1907.

in supplying a belligerent with the necessities of war. The treaties whereby States undertook to refrain from rendering assistance to each other's foes generally provided at first that they should prevent their subjects from doing like acts. But such stipulations were discontinued after the middle of the seventeenth century, and in spite of the occasional protest of a belligerent weak in naval power, as Germany in 1870, and the strenuous opposition of several theoretical writers, especially on the Continent, the mere carrying on of contraband trade by a neutral individual has never been held to compromise in any way the neutrality of the State to which he belongs.¹ The neutral merchant is alone responsible for his violation of the obligations of neutrality; the belligerent is allowed to check such a merchant by direct coercion whenever such action is possible without infringing neutral territory. The law of contraband aims solely at prohibiting the carriage of war material to a belligerent by sea, and does not apply to the sale of such material to either of the warring powers within a neutral country. Such sales are, as a general rule, perfectly legitimate. But a neutral State is bound, by the modern law of neutrality, to prevent vessels intended for the naval operations of a belligerent from being built, fitted out, armed, or supplied with necessities of war, within the neutral territory;² and in the present war the United States Government has construed this duty so strictly that it has prohibited the export of submarines in sections to be put together abroad.

Although a neutral Government is under no inter-

¹ See 5 H. C. 1907, Art. 7, and 13 H. C. 1907, Art. 7

² See 13 H. C. 1907, Arts. 8, 18-20; Foreign Enlistment Act, 1870, secs. 8, 10.

national obligation to forbid its subjects to trade in contraband of war, it may quite legitimately do so, if it likes, so long as it treats both belligerents in the same way and is only actuated by motives of self-interest. Austria and Sweden acted in this way in 1854, and Belgium, Switzerland, and Japan adopted a similar policy in 1870. In the present war the Danish and Swedish Governments have prohibited the export of various articles of warlike use, and restrictions on the re-export of certain commodities have been imposed in those countries and also in Holland and Italy. The usual practice, however, is for the Government merely to warn traders against the risks they run in engaging in contraband and other forms of prohibited commerce. Hitherto this has been the invariable attitude of the United States of America, but in the session opened on December 7, 1914, a Bill was introduced into the Senate making unlawful the sale of arms and ammunition to any country at war with which the United States is at peace. The State Department, however, does not appear to favour the movement to prohibit the export of munitions of war, and it is doubtful if the Bill will pass into law.

HOSTILE DESTINATION

From the nature of contraband trade as one that is unlawful between neutrals and belligerents it follows that the merchandise in question must be not only susceptible, directly or indirectly, of warlike use, but also destined for the use of the enemy of its captor. On the Continent the destination of the goods themselves, rather than that of the vessel by which they are carried, has almost invariably been regarded as the criterion of their contraband character. The British practice of the eighteenth century, however, tended to look primarily to the destination

of the ship. But in connexion with what is called the rule of the war of 1756, as extended in 1793, whereby Great Britain prohibited neutrals from engaging in the trade between French and Spanish colonies and the mother countries from which they had been excluded in time of peace, it was held that goods which had come from those colonies on a neutral vessel nominally destined for a neutral port might be condemned when there was evidence that they had only been sent to the neutral port in order to be subsequently transhipped or transported further on the same or another ship to the enemy country.¹

This doctrine of 'continuous voyage' or 'ultimate destination', as it is called, was applied to contraband during the Crimean War by the French Council of Prize in the case of the *Frau Houwina*, where a cargo of saltpetre taken in transit from Lisbon to Hamburg was condemned on the ground that it was intended to be sent on to Russia. The United States also adopted this rule for contraband trading in the Civil War, and held that the noxious articles could be condemned, irrespective of the destination, immediate or final, of the vessel carrying them, whenever the circumstances indicated that they were ultimately destined for a hostile country or for the naval or military use of the enemy. The fact that the cargo was simply deliverable 'to order or assigns' was particularly taken as justifying the conclusion that the neutral port to which it was nominally consigned was not its real destination.² The British Government acquiesced in this position, and during the Boer War in 1900 definitely claimed to be entitled to treat articles of warlike use as contraband whenever it could be shown that their ultimate destination was hostile, although the vessel

¹ The *William* (1806), 5 C. Rob. 385 ; 1 E. P. C. 505.

² The *Springbok* (1866), 5 Wallace, 1.

carrying them was to call at neutral ports only. The ease with which, in consequence of the development of railway communication in the nineteenth century, a neutral merchant can now supply a belligerent with munitions of war by combined sea and land carriage, renders the law of contraband practically useless for dealing with a continental enemy unless, as is admitted in the United States' Note of December 28, 1914, a reasonable belief that shipments have in reality a hostile destination is sufficient to justify their seizure.

CONTRABAND ARTICLES

A great many treaties have, from the beginning of the sixteenth century, been concluded between numerous States for the purpose of settling what articles should be regarded between the parties as contraband of war ; but their provisions are various and contradictory, and it is obviously impossible to draw up a list of contraband objects that will hold good for all time and in all circumstances. Articles and commodities of use in war are continually changing, while different wars are waged under different conditions, and the needs of all countries cannot be the same owing to the variations in their situation and means. It has accordingly been the universal practice for belligerents to exercise their discretion, subject to such restrictions as may attach either by treaty or under the general law of nations, with regard to the objects to be treated as contraband. The extent to which a belligerent is entitled to interfere with neutral trade in a particular war can only be determined by applying to its special conditions the general principle that neutral traders are bound to refrain from carrying to either belligerent any object intended to assist him in his warlike operations.

In the seventeenth century Grotius, the founder of the science of international law, divided articles of trade during war into three classes: (1) Articles exclusively or primarily used for war; (2) articles susceptible of use in war as well as for purposes of peace; and (3) articles incapable of use in war. Following this classification, it has always been the Anglo-American practice¹ to divide contraband merchandise into two classes, of which the first comprises articles exclusively used for war, such as arms and ammunition, and also certain articles of double use, such as the necessary machinery and material for the manufacture of arms and ammunition and vessels and articles of naval equipment. These commodities are called 'absolute' contraband, and any kind of hostile destination is sufficient for them. The second class comprises all other articles, such as foodstuffs and clothing, of use alike in peace and war. These commodities are called 'conditional' contraband, and are only liable to seizure when they have a particular destination which indicates or suggests that they are meant for the use of the enemy Government or its armed forces; for it is not permissible to employ the law of contraband for the purpose of putting immediate pressure upon the civil population. On the Continent, however, the tendency has been to repudiate the Anglo-American doctrine of conditional contraband, with the result that many things have been declared unconditionally contraband, such as foodstuffs, forage, cotton, coal, and railway material, which are required by the non-combatant population as well as by the military authorities and the Government.

The Declaration of London adopts the distinction

¹ The *Jonge Margaretha* (1799), 1 C. Rob. 189; 1 E. P. C. 100; the *Peterhoff* (1866), 5 Wallace, 28.

between absolute and conditional contraband; and Article 22 enumerates eleven classes of articles (including saddle, draught, and pack animals suitable for use in war, and clothing, equipment and harness of a distinctively military character) which may without notice (*de plein droit*) be treated as contraband of war, under the name of absolute contraband, when destined to territory belonging to or occupied by the enemy or his armed forces. It is immaterial whether the carriage of the goods is direct or entails transshipment or a subsequent transport by land; ¹ and when the ship's only or first port of call is an enemy one, or she is to meet the armed forces of the enemy before reaching the neutral port for which any suspected goods are documented, there is an irrebuttable presumption that the destination of such goods is hostile.² Articles exclusively used for war may be added to the list of absolute contraband by a declaration to be notified as provided in Article 23.

Article 24 enumerates fourteen classes of articles, including foodstuffs, forage, clothing, money, railway material, and fuel, which may without notice be treated as conditional contraband, and which are liable to capture if shown to be destined for the use of the armed forces or of a government department of the enemy State.³ The burden of proving this destination is thrown, in the first instance, upon the captor; but Article 34 provides that it shall be presumed to exist if the goods are consigned to either (1) enemy authorities; (2) a trader (*commerçant*) established in the enemy country who, as a matter of common knowledge, supplies articles of the kind in question to the enemy; (3) a fortified place belonging to the enemy; or (4) any other place serving

¹ Article 30.

² Article 31 (2).

³ Article 33.

as a base for the armed forces of the enemy. In this case, however, the presumptions are rebuttable, and the neutral owner is at liberty to show, if he can, that his goods are in fact intended for the civil population. As a result of Articles 35 and 36 the Declaration exempts conditional contraband from the doctrine of continuous voyage, except in cases where the enemy country has no seaboard ; but the matter was very hotly disputed at the Conference, and the British delegates only agreed to this provision as a contribution to the compromise between conflicting theories and practices.

Article 27 provides generally that articles which are not susceptible of use in war may not be declared contraband, and Article 28 specifies seventeen classes of commodities which are deemed to come within that category. Among these are included several articles, such as cotton, resin, metals, and paper, which have in particular cases been treated as contraband. In accordance with the universal practice it is also provided that articles intended for the use of the vessel in which they are found, or for the use of the crew and passengers during the voyage, may not be treated as contraband.¹ Articles serving exclusively to aid the sick and wounded are similarly exempted from treatment as contraband ; but in case of urgent military necessity such articles may be requisitioned, subject to the payment of compensation, if their destination is the same as that required for absolute contraband.²

CONTRABAND IN THE PRESENT WAR

Since the commencement of the present war several changes have been made by Great Britain and her Allies in the lists of contraband articles. The absolute list

¹ Article 29 (2).

² Article 29 (1).

now in force under the Proclamation of December 23, 1914,¹ contains twenty-nine items, among which are included iron, lead, copper, motor vehicles of all kinds and their component parts, motor tyres, rubber, mineral oils and motor spirit, except lubricating oils, sulphuric acid, range finders, submarine sound signalling apparatus, and sulphur and glycerine and various other ingredients of explosives. The conditional list is still almost the same as that in the Declaration, but hides and undressed leather have been included in it, and aircraft and barbed wire and implements for fixing and cutting the same have been transferred to the absolute list. Germany has added lead, copper, wood, coal-tar, sulphur, sulphuric acid, aluminium, and nickel to the list of conditional contraband. Great Britain has expressly disclaimed any intention to treat cotton as contraband.

The Orders in Council of August 20 and October 29, 1914, adopting the Declaration of London, both leave it to operate unchanged as far as concerns the destination of absolute contraband; but, with regard to conditional contraband, the later Order in Council stipulates for an additional presumption of the hostile destination required by Article 33 if the goods are consigned to or for an agent of the enemy State. It is also stipulated that such contraband shall be liable to capture on board a vessel bound for a neutral port if the goods are consigned 'to order', or if the ship's papers do not show who is the consignee of the goods, or if they show a consignee in territory belonging to or occupied by the enemy. The application of Article 35 may be entirely excluded by notice with respect to any neutral country through which the enemy is shown to be drawing supplies for his armed forces. The special circumstances

¹ *London Gazette*, December 25, 1914.

of the present war, with the extraordinary opportunities which it offers to some neutral countries of becoming, on a scale hitherto unprecedented, a base of supplies for the armed forces of the enemy, make the adoption of strict rules with regard to the destination of conditional contraband absolutely imperative.

VISIT AND SEARCH

A neutral Government being, as we have seen, under no obligation to prevent its subjects from trading in contraband of war, it is essential to the maintenance of neutrality and the interception of the prohibited goods that a belligerent shall have the right to stop and search any neutral merchantman she may meet on the high seas or within her own or her enemy's territorial waters. The exercise of this right, owing to the size of modern vessels and the complexity of their cargoes, is one of the chief causes of friction between belligerents and neutrals; but, unless the search is thorough, it is impossible for a belligerent to satisfy himself that cargoes and manifests correspond, that goods nominally consigned to neutral countries are not really destined for the enemy, and that contraband commodities are not being smuggled in by concealment or disguise. Under modern conditions searches at sea are practically futile. Whenever real ground for suspicion exists it is absolutely necessary to bring the suspected ship into port for examination. Otherwise, as stated in the British Interim Reply to the American Notes, the right of search itself 'would have to be completely abandoned'. In order to protect innocent traders as much as possible, it has always been the practice of British Prize Courts to award compensation to the neutral merchant by condemning the captor

in damages and costs when he failed to make out any case against a prize brought in for carrying contraband, and there were no good grounds for the seizure.¹ Such a right to compensation is now expressly provided by Article 64 of the Declaration of London, which also extends to the case where the prize is released without any judgment being given.

Article 63 of the Declaration provides, in accordance with the established practice, that forcible resistance to the legitimate exercise of the right of stoppage and search shall involve in all cases the condemnation of the vessel. Hitherto Great Britain has always regarded the attempt to take advantage of the convoy of a warship of the neutral nation as equivalent to such forcible resistance.² By adhering to Articles 61 and 62, however, she has waived her right to search vessels so convoyed in the present war; but so far no neutral Power seems to have made any use of this system. As an alternative an arrangement appears to be in process of negotiation with the United States of America whereby immunity from search will be secured for vessels which have obtained certificates as to the nature of their cargoes from British Consular officials or the United States Customs authorities.

Great Britain has always maintained that if, owing to inability to spare a prize crew, or for any other reason, a neutral prize cannot be brought in for adjudication to a port of the captor's State, she must be dismissed, and that no military necessity would justify her destruction.³ But the practice of other States did not always follow this rule, and a limited but ill-defined right to destroy

¹ The *Ostee* (1855), 9 Moore P. C. 150; Spinks, 174; 2 E. P. C. 432.

² The *Maria* (1799), 1 C. Rob. 340; 1 E. P. C. 152.

³ The *Actaeon* (1815), 2 Dods. 48; 2 E. P. C. 209.

neutral prizes is allowed under Articles 48 to 54 of the Declaration of London. Under Article 44 a vessel not herself liable to condemnation may, when the circumstances permit, be allowed to continue her voyage if the master is willing to hand the contraband over to the belligerent warship.

THE PENALTY

In order to punish a neutral for trafficking in contraband of war, it is the established practice to allow a belligerent to confiscate the noxious articles he intercepts, after they have been condemned by a properly constituted Prize Court, and this penalty is confirmed by Article 39 of the Declaration. In the case of conditional contraband, however, and also in the case of such absolutely contraband goods as are in an unmanufactured state and the produce of the country exporting them, it is the British practice to buy the goods (at an advance of 10 per cent. on the cost price) and to pay freight to the carrying vessel. The Declaration of London makes no similar provision for pre-emption, but Great Britain is freely exercising this milder right in the present war. She is also acting in accordance with Article 43 of the Declaration, which provides that when a vessel is encountered at sea while unaware of the outbreak of hostilities or of the declaration of contraband which applies to her cargo, or when the master, after becoming acquainted with these facts, has had no opportunity of discharging the noxious goods, the contraband can only be condemned on payment of compensation.

By the ancient law of Europe the penalty for engaging in contraband trade generally involved the forfeiture, not only of the contraband goods themselves, but also of the ship and any other articles, however innocent

their nature, found on board at the same time. By the end of the eighteenth century, however, it had become the general practice to confine confiscation, in ordinary cases, to the contraband merchandise alone and to the freight due upon it to the neutral carrier, who suffered no further penalty except the loss of time caused by the detention and payment of the captor's expenses. But, according to British prize law, the vessel carrying contraband was liable to condemnation if she belonged to the owner of the contraband cargo; if the carriage of the articles on board was prohibited by a treaty with the country to which she belonged; if her owner was privy to the carriage of the contraband goods; or if she sailed with false or simulated papers, or there were other circumstances amounting to fraud. The destruction or 'spoliation' of papers also *per se* inferred condemnation, since it raised a presumption that it was done for the purpose of fraudulently suppressing evidence; and, as we have seen, a vessel was always subject to confiscation if she forcibly resisted the captor. Innocent goods belonging to the owner of the contraband on board the same vessel were also condemned; but similar articles belonging to another shipper were released, though no compensation was paid to their owner for the detention and loss of market.

The American Prize Courts followed the same rules, but continental Powers generally laid the criterion in the proportion of the guilty part of the cargo to the whole. After prolonged debates at the London Conference, it was decided to adopt the 'proportion' rule in the case of the ship, which, according to Article 40, may be confiscated if the contraband, reckoned either by value, weight, volume, or freight, forms more than half the cargo. If she is released she may be condemned to pay

the captor's expenses.¹ For the innocent part of the cargo the British rule of similar ownership is adopted.² But the vessel and the remainder of the cargo are not liable to condemnation or to the captor's expenses when she is encountered at sea while unaware of the outbreak of hostilities or of the declaration of contraband applicable to her cargo, or if after knowing thereof the master has had no opportunity to discharge the offending articles.³

As a general rule, when the hostile destination has been reached and the forbidden merchandise delivered—in technical language, 'deposited'—the vessel is no longer liable to capture and the belligerent cannot seize her on the return voyage or touch the proceeds of sale of the contraband cargo. The Anglo-American practice recognizes an exception to this rule where the vessel has carried contraband on her outward voyage with false or simulated papers,⁴ but Article 38 of the Declaration of London disallows capture on the return voyage under any circumstances. In the present war, however, Great Britain is adhering to her former practice, and the Order in Council of October 29 provides that 'a neutral vessel, with papers indicating a neutral destination, which, notwithstanding the destination shown on the papers, proceeds to an enemy port, shall be liable to capture and condemnation if she is encountered before the end of her next voyage'.

¹ Article 41.

² Article 42.

³ Article 43.

⁴ *The Margaret* (1810), 1 Acton, 333; 2 E. P. C. 311.